172

(2)

Supreme Court, U.S.
FILED
OCT 8 - 2010
OFFICE OF THE CLERK

No. 09-1578

IN THE
# Supreme Court of the United States

ALTUS FINANCE S.A., *et al.*,

*Petitioners*,

v.

SAFG RETIREMENT SERVICES, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

M. RANDALL OPPENHEIMER
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, CA 90067

MARC F. FEINSTEIN
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
JONATHAN D. HACKER
LOREN L. ALIKHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Counsel for Respondent*

## PARTIES TO THE PROCEEDING

The name of the entity identified in the petition caption as respondent AIG Retirement Services, Inc. (formerly known as SunAmerica Inc.) has been changed to SAFG Retirement Services, Inc. The caption of this brief reflects the current name of the entity, and the body of the brief refers to the entity as SunAmerica, its name during the events at issue.

## CORPORATE DISCLOSURE STATEMENT

Respondent SAFG Retirement Services, Inc., is a wholly owned subsidiary of American International Group, Inc., a publicly held corporation.

## TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING ..... i

CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

STATEMENT ..... 3

A. Petitioners Conceive A Fraudulent Scheme To Acquire ELIC ..... 4

B. The Sale Of ELIC's Junk Bonds Is Severed From Sale Of Its Insurance Assets ..... 5

C. Artemis Is Formed To Further The Fraudulent Scheme ..... 6

D. SunAmerica Renews Its Pursuit Of ELIC ..... 7

E. SunAmerica Is Defrauded In The 1993 Bidding For ELIC ..... 9

F. Artemis Becomes Majority Owner Of New California By Further Fraud ..... 14

G. The Deceit Finally Surfaces, And Petitioners Plead To Their Crimes ..... 15

H. Proceedings Below ..... 18

REASONS FOR DENYING THE PETITION ..... 20

I. THERE IS NO BASIS FOR REVIEW OF ANY QUESTION CONCERNING SUMMARY JUDGMENT STANDARDS ..... 20

## TABLE OF CONTENTS
(continued)

Page

II. THERE IS NO BASIS FOR REVIEW OF THE COURT OF APPEALS' RULING ON THE STATUTE OF LIMITATIONS ..... 26

III. REVIEW IS UNWARRANTED BECAUSE THE CASE IS INTERLOCUTORY ..... 30

CONCLUSION ..... 31

# TABLE OF AUTHORITIES

Page(s)

## CASES

*Adams v. Robertson*,
520 U.S. 83 (1997) ..... 28

*Ashcroft v. Iqbal*,
129 S. Ct. 1937 (2009) ..... 20

*Bell Atlantic Corp. v. Twombly*,
550 U.S. 544 (2007) ..... 20

*Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*,
389 U.S. 327 (1967) ..... 30

*Bradley v. Chiron Corp.*,
136 F.3d 1317 (Fed. Cir. 1998) ..... 28, 29

*Butler v. McKellar*,
494 U.S. 407 (1990) ..... 22

*California v. Altus Fin. S.A.*,
540 F.3d 992 (9th Cir. 2008) ..... 16

*City Solutions, Inc. v. Clear Channel Commc'ns, Inc.*,
365 F.3d 835 (9th Cir. 2004) ..... 21

*F.C.C. v. Fox Television Stations, Inc.*,
129 S. Ct. 1800 (2009) ..... 21

*Garamendi v. Altus Fin. S.A.*,
2005 WL 1389044 (C.D. Cal. June 10, 2005) ..... 17, 18

*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*,
240 U.S. 251 (1916) ..... 30

## TABLE OF AUTHORITIES
(continued)

Page(s)

*Hoover v. Ronwin*,
466 U.S. 558 (1984) ..... 28

*In re Daley's Dump Truck Servs.*,
108 F.3d 213 (9th Cir. 1997) ..... 21

*Merix Corp. v. Cent. Laborers Pension Fund*,
129 S. Ct. 763 (2008) ..... 28

*PAE Gov't Servs. v. MPRI, Inc.*,
514 F.3d 856 (9th Cir. 2007) ..... 28, 29

*Philip Morris USA Inc. v. Scott*,
No. 10A273, slip. op. (Sept. 24, 2010) ..... 27, 28

*United States v. United Foods, Inc.*,
533 U.S. 405 (2001) ..... 21

*Va. Military Inst. v. United States*,
508 U.S. 946 (1993) ..... 30

*Zobrest v. Catalina Foothills Sch. Dist.*,
509 U.S. 1 (1993) ..... 21

No. 09-1578

IN THE
# Supreme Court of the United States

ALTUS FINANCE S.A., *et al.*,

*Petitioners*,

v.

SAFG RETIREMENT SERVICES, INC.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

## INTRODUCTION

This Court is not likely to see a less meritorious petition for certiorari on the regular docket this Term. The petition here embodies literally every factor that counsels against certiorari: it implicates no circuit conflict, it is entirely factbound, it is interlocutory, it involves state-law issues, the decision below is non-precedential, and the questions ostensibly presented were neither pressed by petitioners below nor passed on by the court of appeals. Any one of those grounds is normally a good and sufficient reason to deny certiorari. This petition runs the table on all of them.

Petitioners' main attack on the decision below is that the court of appeals did not apply proper summary judgment standards to the particular facts of the case. But in reciting the record facts that ostensibly expose that error, petitioners fail even to acknowledge, much less adhere to, the recognized summary judgment standard, which requires that the facts be reviewed in the light most favorable to respondent SAFG Retirement Services, Inc., formerly known as SunAmerica Inc. ("SunAmerica"), taking all reasonable inferences in SunAmerica's favor. When that record is properly reviewed, the correct outcome is obvious, as reflected in the per curiam, unpublished judgment of the court of appeals. That is, under the applicable state-law standards for proving the elements of a fraud claim, including causation and reliance, there was more than enough evidence for a reasonable jury to find that petitioners' undisputed acts of fraud—indeed, their *confessed crimes*—caused damage to respondent resulting in monetary losses. There is nothing to review in that factbound, interlocutory, non-precedential judgment.

The second question presented is equally insubstantial. It asserts that the court of appeals erred in determining that SunAmerica's complaint alleged facts sufficient to satisfy the state-law statute of limitations on its state-law tortious interference claims. Petitioners' theory is that the court was legally required to disregard SunAmerica's allegation concerning when it became aware of the relevant conduct, because SunAmerica had made an ostensibly contradictory allegation in an earlier version of the complaint. But there is nothing contradictory about the allegations at all, and no legal controversy

of any kind is implicated by the decision. The court of appeals recognized petitioners' (and the district court's) erroneous reading of SunAmerica's allegations and correctly held that SunAmerica's state-law tortious interference claims should not have been dismissed at the pleading stage. That interlocutory, factbound, unpublished disposition will have no consequences for any other case.

Certiorari should be denied.

## STATEMENT

As in their briefs before the court of appeals, petitioners' recitation of the facts makes no effort to consider the record in the light most favorable to the nonmovant, SunAmerica. *See Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) ("Because this case arises in the posture of a motion for summary judgment, we are required to view all facts and draw all reasonable inferences in favor of the nonmoving party."); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). To understand why the decision below was so straightforward for the court of appeals under settled summary judgment standards, it is important to view the complete record in the proper light. That record shows the following.[1]

[1] A complete recitation of the facts may be found in SunAmerica's opening brief in the court of appeals ("SunAmerica CA9 Br.") at 6-26.

### A. Petitioners Conceive A Fraudulent Scheme To Acquire ELIC

In early 1991, Executive Life Insurance Company ("ELIC"), a California company, was having severe financial troubles as a result of the declining value of its junk bond portfolio. California's Insurance Commissioner, John Garamendi ("the Commissioner"), seized ELIC in April 1991 and became its executor and conservator. Because the Commissioner was charged with protecting ELIC's policyholders and creditors, the goal was to rehabilitate the company rather than liquidate it. The Commissioner thus solicited bids to rehabilitate ELIC, with a preference for bid proposals that would address both ELIC's insurance business and its junk bond portfolio.

Petitioner Crédit Lyonnais, a French bank owned and controlled by the French government at the time, and its subsidiary, Altus, were interested in ELIC's insurance business. At the time, however, California law prohibited foreign governments from directly or indirectly controlling California insurance companies, and federal law prohibited bank holding companies from directly or indirectly owning more than 5% of non-banking business. To evade those prohibitions, Altus—with Crédit Lyonnais' assent—entered into several *contrats de portage*, or fronting agreements, under which a group of companies nominally eligible to acquire ELIC's insurance assets would act as fronts for Altus. Altus Managing Director Jean-François Hénin approached MAAF, a private French automobile insurer, about serving as a front, and he eventually arranged *contrats de portage* with MAAF and several other entities (the "MAAF Group"), pursuant to which the Group would

bid for ELIC's insurance business without disclosing that Altus, acting for itself and Crédit Lyonnais, would be the true owner.

The fronting arrangement between Altus and MAAF was memorialized in a set of agreements, including a "Management Agreement," which provided that MAAF would nominally own an interest in an entity created to acquire the ELIC insurance business—New California Life Holdings ("New California")—but would exercise its ownership rights at the direction, and for the benefit, of Altus. The Management Agreement listed MAAF as the "temporary manager" of New California, but relieved it of all responsibility and liability in connection with its management of the company. In their agreements, Altus agreed to purchase all of MAAF's shares in New California. Each party expressly agreed not to disclose the existence or terms of these agreements. All of the front companies entered similar agreements with Altus, entitling them to a fee for secretly holding shares for Altus. New California came into being in 1991, and its shares were eventually held by the entire MAAF Group.

### B. The Sale Of ELIC's Junk Bonds Is Severed From Sale Of Its Insurance Assets

In 1991, Altus and the MAAF Group submitted what appeared to be a joint proposal to the Commissioner for the comprehensive rehabilitation of ELIC, with the MAAF Group bidding for the insurance business and Altus bidding for the junk bond portfolio. SunAmerica also bid, but only for the insurance business, and its bid was rejected because it did not include a plan for handling the junk bonds. The

Commissioner selected three "comprehensive" bids as finalists. On November 14, 1991, the Commissioner selected the French bid, largely because, whereas the other finalists proposed limited guaranties against further devaluation of the junk bonds, Altus agreed to purchase the junk bonds outright for cash, which would absolutely protect policyholders from risk on the junk bonds. The court overseeing the ELIC rehabilitation (the "Rehabilitation Court") approved the Commissioner's selection.

The Commissioner wanted to remove the junk bonds from the insurance assets as quickly as possible because he believed them to be "toxic." With the Rehabilitation Court's approval, he transferred ELIC's junk bonds portfolio to Altus in March 1992, severing the junk bond sale from the rest of the rehabilitation plan and concluding an irrevocable transfer. In July 1992, the Rehabilitation Court approved the transfer of the insurance assets to New California, but the decision was stayed while policyholders challenging aspects of the rehabilitation plan sought appellate review.

### C. Artemis Is Formed To Further The Fraudulent Scheme

At about the same time, in the summer of 1992, Crédit Lyonnais received an inquiry from the U.S. Federal Reserve, its banking regulator for its U.S. activities, that made Crédit Lyonnais concerned the fronting arrangements would be discovered. To prevent exposure of the fraudulent scheme but profit from it nonetheless, Crédit Lyonnais and Altus decided to transfer their interest in the insurance business to a newly formed entity, named Artemis,

which consisted of Crédit Lyonnais, Altus, and the holding company of François Pinault, a French businessman and major Crédit Lyonnais customer who was deeply in debt and willing to join the unlawful conspiracy. Artemis was formed to acquire the insurance business from the MAAF Group along with some of Altus's ELIC junk bonds, while engaging in fraud to keep the fronting arrangements and other unlawful conduct hidden. The new partnership was formalized in a secret memorandum of understanding ("MOU") executed on December 24, 1992, which granted Artemis the right to acquire all of Altus's ownership interests in New California.

Pinault became the chairman of Artemis. When he signed the MOU, he knew about the Altus/MAAF Group *portages* and the need to conceal the agreements because of their illegality. To cover up the scheme, Pinault later signed a backdated version of the MOU, which deleted mention of Altus's illicit ownership rights in New California and provided instead that Altus would do its "utmost to ensure that Artemis acquires the rights to" New California.

Pursuant to the MOU, Hénin worked at both Altus and Artemis in 1993. His mandate was to deliver the ELIC insurance business to Artemis. Within days after the MOU was executed, Artemis mobilized to acquire the insurance business and began seeking California Department of Insurance ("DOI") approval of the acquisition.

### D. SunAmerica Renews Its Pursuit Of ELIC

In March 1993, the California Court of Appeal invalidated the rehabilitation plan for ELIC's insur-

ance business. *See Commercial Nat'l Bank v. Superior Court*, 17 Cal. Rptr. 2d 884 (Cal. Ct. App. 1993). The Rehabilitation Court promptly reopened bidding for ELIC's insurance assets (the junk bond sale was already final), and threatened to liquidate the estate unless the Commissioner submitted a new plan immediately.

Crédit Lyonnais, Altus, and Artemis remained interested in the insurance business. At Hénin's direction and acting for Crédit Lyonnais, Altus, Artemis, and the MAAF Group agreed to a minimally revised bid that was submitted to the Rehabilitation Court in April 1993, concealing the fact that Altus, now joined by Artemis, were the bid's true parties-in-interest.

SunAmerica remained interested as well, and believed the conditions for a purchase were even better now that the junk bonds were severed from the estate. SunAmerica CEO Eli Broad began the process of preparing a bid with a deal team of SunAmerica executives and outside advisors. His team visited the ELIC data room, analyzed the MAAF Group's plan, and ran financial and actuarial projections to evaluate the investment returns. They also prepared a draft bid.

On May 26, 1993, Broad and his team met with the Commissioner and described SunAmerica's plan to submit a bid with terms materially better than the MAAF Group's, plus a superior domestic insurance platform for servicing ELIC policyholders, compared to MAAF, which was mainly an automobile insurer with no U.S. operations. On June 1, 1993,

SunAmerica formally advised the Commissioner of its plan to make a competitive bid.

### E. SunAmerica Is Defrauded In The 1993 Bidding For ELIC

When SunAmerica emerged as the only competitor for ELIC's insurance business, petitioners' financial advisor informed Hénin and Pinault of the threat. No party other than SunAmerica ever expressed serious interest in making a competitive bid in 1993, and in fact no other bids were made despite the open auction. Parties that had submitted comprehensive bids (i.e., including purchase of the junk bonds) in 1991 were uninterested in 1993, since the junk bonds had already been sold. SunAmerica posed the sole threat, and to neutralize that threat, petitioners decided to invite SunAmerica to participate in the MAAF deal. Indeed, petitioners were so concerned about a competitive SunAmerica bid that they agreed to sell 33% of New California's stock to SunAmerica at par—i.e., the same price paid by the MAAF Group—even though that meant relinquishing an investment they expected to be highly profitable.

SunAmerica was approached by financial and legal advisors to the MAAF Group about joining the MAAF Group bid. These advisors, acting ostensibly as the MAAF Group's representatives but actually controlled by Crédit Lyonnais, Altus, and Artemis, proposed to sell SunAmerica an interest in New California in exchange for SunAmerica's agreement to forgo bidding for ELIC. These advisors assured Broad that if SunAmerica took a minority position, it

would be the natural exit strategy for the MAAF Group to sell its interest to SunAmerica.

At the time of this overture, SunAmerica had no plans to partner with the French. But the proposal was potentially attractive and the Commissioner encouraged SunAmerica to consider a joint bid rather than risk the disruption and delays that could result from a bidding war. Accordingly, Broad directed his team to proceed on two tracks: prepare an independent bid for the whole insurance company, but also talk to the MAAF Group's advisors about potentially joining its bid as co-owner of the insurance business, with a view toward buying out the MAAF Group's interest later. The independent-bid track produced a draft term sheet dated June 7, 1993, that proposed terms for SunAmerica to acquire 100% of ELIC. The second track led to the fraud giving rise to this case.

Given SunAmerica's strong interest in eventually owning all of New California (even under track two), SunAmerica repeatedly pressed the MAAF Group's representatives for information about the identities of (and controls over) the MAAF Group members, as well as whether there were any preexisting rights or options with respect to the MAAF Group's New California shares. SunAmerica made clear that it wanted to know whether the ultimate owners of the insurance company would be the MAAF Group, and SunAmerica negotiated a right of first refusal, providing it a reasonable opportunity to acquire the MAAF Group's interest if and when it was offered for sale in a transaction subject to the first-refusal right. To allay SunAmerica's concerns and induce it to join

the MAAF Group bid, petitioners made a series of false and misleading statements.

Petitioners stated that the members of the MAAF Group "were the ultimate controlling parties" of the group and there were no "other rights, options, warrants, agreements with respect to the [MAAF Group] shares," and that MAAF was the lead investor, was the only one with any insurance experience, and was interested only in obtaining "short term" profits from owning the insurance company. As petitioners later admitted, under the *portages* the MAAF Group entities were not the "ultimate controlling parties," but were actually fronts for Altus, Crédit Lyonnais, and Artemis, which together controlled the MAAF Group's rights in New California and had no interest in yielding their stake to SunAmerica. Petitioners also fraudulently concealed the fact that the MAAF Group bid was illegal under both California and federal law, and thus would have failed had its illegality been disclosed. And contrary to the statement that no other rights or options existed with respect to the MAAF Group, Altus in fact secretly held the right to direct the sale of the New California shares and had granted an option in the shares to Artemis.

Petitioners also made false statements about entities involved in the right of first refusal—statements crucial to inducing SunAmerica to join the deal. SunAmerica insisted on that right to protect its continuing interest in owning 100% of the insurance business. In response, petitioners claimed they wanted an exception for a short list of "Permitted Transferees"—entities that could purchase the MAAF Group's New California shares in the first year without triggering SunAmerica's right of first

refusal. When SunAmerica pressed for information about these unnamed entities before agreeing to this exception, petitioners falsely identified them as Crédit Lyonnais customers considering whether to invest, when in fact Artemis (a Permitted Transferee) actually had *already agreed* to purchase the MAAF Group shares through an agreement in which Altus and Crédit Lyonnais stood to benefit. Indeed, the entire point of the Permitted Transferee provision was—unbeknownst to SunAmerica—to facilitate the unlawful transfer of the MAAF Group's (already unlawful) interest in New California to Artemis without competition from SunAmerica. As the director general of Crédit Lyonnais testified, "the sole concern of Altus in this entire operation was to ensure that [New California] would be purchased by Artemis as quickly as possible.... I can assure you that no one in Crédit Lyonnais had any ideas other than to do that." Petitioners' representations also concealed the fact that Artemis would be an *illegal* Transferee, able to purchase the MAAF Group shares only by deceiving government regulators.

The false statements and misleading omissions were not limited to pre-bid discussions—petitioners had them written into the documents memorializing SunAmerica's purchase of New California stock. In those documents, New California (which was controlled by MAAF) falsely represented that:

- there were no "outstanding ... options ... or other rights or agreements to purchase ... any shares of capital stock";
- the only New California stockholders at closing would be SunAmerica, the MAAF Group,

and designated persons to which they were permitted to transfer their stock; and

- New California's acquisition of the ELIC insurance business would not "violate ... any statute or law."

None of those statements was true. Yet they were pivotal to SunAmerica's decision to forgo its independent bid and join the MAAF Group bid. If petitioners had disclosed the truth about the unlawful bid and the preexisting agreements to sell MAAF Group shares unlawfully to Artemis, SunAmerica never would have joined the illegal bid, but would have alerted the Commissioner and continued to pursue its own bid. That bid would have won, because it would have been the only other bid—and the only legal bid—and SunAmerica was ready, willing, and able to agree to the deal terms the Commissioner already found acceptable. Instead, on June 10, 1993, induced by petitioners' fraud into forgoing its own bid, SunAmerica entered into a Subscription Agreement with New California, in which SunAmerica agreed to acquire a 33% interest, and a Confidentiality and Standstill Agreement, in which it agreed not to submit an independent bid. The Stockholders Agreement—which contained SunAmerica's right of first refusal—was an exhibit to the Subscription Agreement and was separately executed.

With the Commissioner's and the Rehabilitation Court's approval, the ELIC insurance business was transferred to New California subsidiary Aurora on September 3, 1993, for a $300 million capital infusion. At the closing, SunAmerica finally received the

list of five Permitted Transferees, one of which was Artemis, and all of which were secretly controlled by Pinault.

### F. Artemis Becomes Majority Owner Of New California By Further Fraud

Shortly after closing, Artemis redoubled its efforts to obtain DOI approval to acquire the MAAF Group's New California stock, and staggered its acquisitions to "prevent the transaction from appearing 'pre-arranged.'" Artemis made a series of filings with the DOI in 1994 and 1995 for approval to acquire the stock. In these filings, Artemis deliberately misrepresented its relationship with Crédit Lyonnais and fraudulently concealed the MOU and the *portages*.

Under the Stockholders Agreement, a Permitted Transferee purchasing New California stock was required to send a Joinder to SunAmerica agreeing to comply with the terms of the Stockholders Agreement. Recognizing the illegal nature of its purchase, Artemis extensively discussed the timing and content of the Joinder out of concern that SunAmerica would seize on it to block the purchase. On August 10, 1994, Artemis sent a misleading Joinder to SunAmerica as the one-year deadline to effectuate the transfer approached. The Joinder portrayed the transfer as an ordinary transaction, stating that Artemis had "agreed to purchase" New California shares from the MAAF Group investors and that it had obtained the DOI's approval for the acquisition of the shares. The Joinder failed to disclose that Artemis's agreement to purchase the MAAF Group's shares was based on a secret December 1992 MOU

with Crédit Lyonnais and Altus and the underlying *portages*; that the MAAF Group entities were merely fronts; that Crédit Lyonnais and Altus had directed and arranged the sale of the MAAF Group's shares to Artemis; and that Artemis had obtained any DOI approval by lying about the extent of Crédit Lyonnais's and Altus's involvement in New California.

By 1995, Artemis completed its acquisition of all of the MAAF Group's New California stock, representing 67% of the company. Throughout this period, petitioners recognized the importance of continued secrecy and deceit to ensure that SunAmerica did not upset their illicit plan. In one memo to Artemis CEO Patricia Barbizet, joint Crédit Lyonnais/Altus/Artemis representative Bernard Attal commented that if the "confidential" agreements were revealed, the "natural consequence" would be that "the entire transaction would be blown and the deal handed to our friend Braud [sic] on a silver platter." In the spring of 1995, Artemis received dividends from MAAF on New California stock Artemis had not yet obtained DOI approval to acquire. Attal advised Barbizet that the dividend swap "is required to be revealed to the department and, if it isn't [revealed], we can be exposed to substantial problems if we are found out." Artemis proceeded with the swap anyway, in secret.

### G. The Deceit Finally Surfaces, And Petitioners Plead To Their Crimes

In early 1999, acting on information from an informant, the Commissioner filed suit against the involved parties including Crédit Lyonnais, MAAF, Altus, and others, alleging that he had been fraudu-

lently induced to transfer ELIC's assets by their failure to disclose their secret fronting agreements. On February 16, 2000, in his third amended complaint, the Commissioner added Artemis, New California, and Aurora as defendants in the action. In February 2005, on the eve of trial, the Crédit Lyonnais Defendants settled with the Commissioner and another plaintiff (Sierra, one of the finalists in the 1991 bidding) for $600 million, and the MAAF entities took a voluntary default. After a three-month trial on liability against Artemis, in May 2005, the jury returned a verdict finding that Artemis, Crédit Lyonnais, Altus, and MAAF had engaged in a fraudulent conspiracy to acquire ELIC's assets. The jury later awarded the Commissioner $700 million in punitive damages against Artemis. And in November 2005, the district court in the Commissioner's action awarded the Commissioner approximately $241 million in restitution from Artemis.[2]

Although the Commissioner was victorious in important respects, the defendants aggressively attacked his testimony about what he would have done in 1993 if the fraud had been disclosed. To maximize his damages, the Commissioner and his Deputy testified that had they known of the fraud in 1993 the

---

[2] In 2008, the Ninth Circuit vacated the $700 million punitive damages award because California law does not permit an award of punitive damages in the absence of a compensatory damages award, and it remanded for the district court to hold a new trial on damages. *See California v. Altus Fin. S.A.*, 540 F.3d 992, 1011 (9th Cir. 2008). The pretrial proceedings are underway. *See* C.D. Cal. Docket No. 99-2829. The court of appeals also vacated the $241 million restitution award with leave to reinstate at the close of the new damages trial. *See Altus*, 540 F.3d at 1011.

Commissioner would have unwound the entire deal, including the separate junk bond sale, so that both ELIC assets—the insurance business and the junk bonds—could be sold to a company sponsored by NOLHGA, which had been a competing finalist in the original 1991 auction. (If the Commissioner had been able to select the NOLHGA "bonds in" deal, then the ELIC estate would have participated in profits ultimately realized from the insurance business *and* the junk bonds.) But that position was directly contrary to the Commissioner's 1991 actions and statements rejecting the NOLHGA bid and separating the junk bonds from the insurance company on the ground that the junk bonds were "toxic." It also contradicted representations the Commissioner made to the Rehabilitation Court in 1993 when certain parties moved to rescind the bond sale, including that the junk bond sale had been severed from the insurance transaction and declared final and the bonds themselves sold to Altus for fair market value, that rescission was largely impossible because Altus had resold many of the bonds, and that it was contrary to the policyholders' desires to have the rehabilitated insurance company take back the risky junk bonds.

When the Commissioner advanced his version of events in his lawsuit, Artemis—which argues here that the Commissioner's testimony categorically bars SunAmerica's fraud claims—argued that the Commissioner was "making [it] up as he goes along." The jury specifically rejected the Commissioner's assertion that in 1993 he would have rescinded the earlier junk bond sale. *See* Post-Verdict Order, *Garamendi v. Altus Fin. S.A.*, No. 99-2829, 2005 WL

1389044, at *8 (C.D. Cal. June 10, 2005). Nothing in the court of appeals' decision remanding for a new damages-phase trial (*see supra* note 2) undermines those findings.

In addition to settling the Commissioner's fraud action, Crédit Lyonnais and CDR-E (the successor to Altus) each pleaded guilty to three felony counts of making false statements to federal banking regulators by, *inter alia*, concealing the *contrats de portage* and the true ownership of New California. They agreed to pay $200 million in criminal fines and civil penalties for the fraud. MAAF likewise pleaded guilty to felony charges of causing false statements to be made to the Federal Reserve, and MAAF agreed to pay a $10 million criminal fine.

**H. Proceedings Below**

On February 9, 2005, SunAmerica brought suit against petitioners and others in the Central District of California, asserting claims for fraud, breach of contract, tortious interference with contract and prospective economic advantage, and unjust enrichment.

SunAmerica's fraud claims ultimately ripened into two distinct grounds for recovery that remain in the case. The "defrauded bidder" claim contends that, but for petitioners' misrepresentations and omissions in 1993, SunAmerica would never have joined petitioners' illegal bid for ELIC, but would have obtained 100% of ELIC's assets through the independent bid it was induced to forgo by petitioners' fraud. The "defrauded holder of right of first refusal" claim contends that petitioners' misrepresentations and omissions in the joinder in 1994 prevented the

fraudulent scheme from coming to light and enabled Artemis to complete the unlawful purchase of the MAAF Group's New California stock, costing SunAmerica the ability to purchase the stock pursuant to its right of first refusal in what should have been a controlled divestiture of the MAAF Group's shares to a legal transferee.

The district court granted petitioners' motions to dismiss in part on March 1, 2006. The court held that SunAmerica's complaint did not adequately allege facts establishing a breach of contract (including the implied covenant of good faith), and that the tortious interference claims were untimely, based on an allegation SunAmerica made in an earlier version of the complaint. The district allowed the fraud claims to proceed, and the parties began discovery.

On June 1, 2007, the district court granted petitioners' motions for summary judgment. The court held that SunAmerica had failed to establish an entitlement to relief under the California statutes governing fraud claims and that SunAmerica's damages claims were too speculative under California's causation standards to permit a reasonable jury to find in SunAmerica's favor.

The court of appeals reversed in substantial part on February 9, 2010, in an unpublished opinion. The court of appeals held that SunAmerica's complaint adequately stated a claim for breach of the implied covenant of good faith under Delaware law and for tortious interference with contract and prospective economic advantage. Pet. App. 3a-4a, 7a. The court of appeals also held that the district court had erred in construing California's fraud-damages statute and

in finding that SunAmerica's fraud claims were impermissibly speculative, citing circuit precedent applying California's state-law causation standards to similar facts. *See id.* at 4a-6a (citing *City Solutions, Inc. v. Clear Channel Commc'ns, Inc.*, 365 F.3d 835, 839 (9th Cir. 2004)). The court of appeals affirmed the grant of summary judgment on SunAmerica's unjust-enrichment claim and a third fraud claim no longer at issue in the case. *See id.* at 6a.

A petition for rehearing and rehearing en banc was denied, with no judge requesting a poll. Pet. App. 11a-13a.

Petitioners sought certiorari, challenging only the rulings on the fraud and tortious interference claims, leaving the breach of contract claim unaffected.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO BASIS FOR REVIEW OF ANY QUESTION CONCERNING SUMMARY JUDGMENT STANDARDS

Petitioners' first question presented is whether a court "may rely on its judicial experience and common sense in making plausibility determinations on Rule 56 motions," as courts must do at the pleading stage under this Court's precedents in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Pet. 12 (internal quotation marks omitted); *see also id.* at 23-24. There is no basis for review of that question here.

The court of appeals reversed summary judgment on SunAmerica's "defrauded bidder" and "defrauded holder" claims because it determined that there were triable issues of fact concerning causation and reli-

ance under applicable state-law standards set forth in prior Ninth Circuit precedent. *See, e.g.*, *City Solutions*, 365 F.3d at 840 ("Because of the highly subjective nature of a causation analysis, the Supreme Court of California has instructed that the question whether a party detrimentally relied on the misrepresentation of another party is properly left to a jury."); *In re Daley's Dump Truck Servs.*, 108 F.3d 213, 215 (9th Cir. 1997) ("[J]ustifiable reliance is normally a factual question for the jury."). In briefing that issue on appeal, the parties each relied only on the usual summary judgment standards. *Compare* SunAmerica CA9 Br. 45, 56, *with* CDR CA9 Br. 27-28.

Nowhere did petitioners argue below that this Court's decisions in *Twombly* and *Iqbal* should be applied at the summary judgment stage. The question as petitioners present it is therefore waived. *See F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court ... is one of final review, not of first view." (internal quotation marks omitted)); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). At the same time, however, SunAmerica never suggested that judicial experience and common sense are *not* relevant at the summary judgment stage, and the court of appeals' decision makes no such suggestion. The court simply had no briefing or argument before it addressing that proposition either way. If the Ninth Circuit or some other appellate court one day issues a published, precedential decision holding that district courts are prohibited from applying judicial experience and common sense in ruling on

summary judgment motions, this Court might consider reviewing such a decision.[3] The decision here is nothing of the kind.

Further, because the decision announces no rule of law concerning the application of judicial experience and common sense at summary judgment, it does not implicate a circuit conflict of any kind. Petitioners themselves do not suggest otherwise.

Petitioners unavoidably are complaining about the court of appeals' application of state-law causation and reliance standards to the summary judgment evidentiary record on SunAmerica's fraud claims. Petitioners are disappointed that the court of appeals agreed that SunAmerica had adduced sufficient evidence for a factfinder to find causation and reliance under governing state-law standards, but there is simply no federal question to review in that determination.[4] Instead, petitioners attempt to manufacture an argument about the content of the

---

[3] Even then, the Court would likely await further "percolation" of the issue among other lower courts. *Butler v. McKellar*, 494 U.S. 407, 430 n.12 (1990) (Brennan, J., dissenting) (internal quotation marks omitted). When the issue *does not yet even exist*, certiorari is wholly implausible.

[4] Contrary to petitioners' submission (Pet. 18-19), nowhere did the Ninth Circuit suggest that but-for causation issues involving "future" events—as all but-for inquiries do—are categorically inappropriate for disposition on summary judgment. The question simply is whether plaintiff adduced sufficient evidence to permit a factfinder to find causation under applicable state-law standards. Because SunAmerica adduced overwhelming evidence from which a reasonable juror could conclude that SunAmerica would have obtained 100% of ELIC's assets but for petitioners' fraud, summary judgment for petitioners was obviously inappropriate.

federal summary judgment standard—an argument that was neither pressed nor passed on below, and is therefore not reviewable by this Court.

And the argument lacks merit in any event. Petitioners' argument essentially is that the court of appeals erred so substantially in finding triable issues of fact on causation and reliance that its decision "implict[ly]" reflects application of an inappropriate summary judgment standard. But as already discussed, it is petitioners that apply an inappropriate summary judgment standard—which is to say, they apply no recognized summary judgment standard of any kind. They simply report the facts favorable to themselves as if no other facts existed, ignoring the facts and inferences favorable to SunAmerica, including wholly undisputed facts that virtually compel judgment for SunAmerica.

*The Defrauded Bidder Claim.* SunAmerica's "defrauded bidder" claim seeks recovery for petitioners' misrepresentations and omissions in 1993 in inducing SunAmerica to forgo its bid for ELIC. The record evidence firmly established that if SunAmerica had known about the illegality of petitioners' *contrats de portage*, it would not have joined petitioners' illegal bid as a minority participant, but would have obtained 100% of ELIC through the superior independent bid it was already preparing. *See supra* at 8-10. The court of appeals correctly held that the district court erred in granting summary judgment in the face of that record.

Petitioners contend that the evidence supports their position (Pet. 21-23), but there is a better forum for petitioners to advance that argument: *at*

*trial*. As they did below, petitioners minutely parse the causal chain to identify nine so-called "contingencies" that they say preclude recovery, *id.* at 20-21, but in fact the record shows that each step is either non-existent or easily satisfied by overwhelming and even undisputed record evidence in SunAmerica's favor, *see* SunAmerica CA9 Br. 52-55; SunAmerica CA9 Reply Br. 13-31.

The two contingencies emphasized in the petition exemplify petitioners' tendentious treatment of the record. Petitioners focus mainly on the Commissioner's assertion that if the fraud had been revealed in 1993, he would have rescinded the entire transaction and sought to negotiate a "comprehensive" deal involving both the insurance assets and the junk bonds. Pet. 21-22. But as shown above, Artemis itself has argued that the Commissioner's testimony contradicts his actions and statements in 1991 and 1993, and the jury in the Commissioner's own case declined to accept his testimony. *See supra* at 17-18. Petitioners cannot seriously contend that testimony they themselves consider non-credible suffices to defeat SunAmerica's claims.

The record also refutes petitioners' assertion that "numerous parties" might have re-entered the bidding in 1993 if petitioners' fraud had been disclosed. Pet. 22 (internal quotation marks omitted). In fact, no other party took any steps toward making a bid in 1993, and no other party would or could have offered terms comparable to what SunAmerica was offering. SunAmerica CA9 Br. 53-54; SunAmerica CA9 Reply Br. 23-36. A reasonable jury could easily find that SunAmerica would have obtained ELIC's assets if the MAAF Group bid had been disqualified.

*The Defrauded Holder of a Right of First Refusal Claim.* This claim contends that petitioners' defrauded SunAmerica in 1994 when the MAAF Group sold its shares to Artemis without disclosing to SunAmerica that Artemis was an unlawful purchaser, which would have permitted SunAmerica to block the sale to Artemis and obtain the shares by exercising its right of first refusal. Petitioners contend (Pet. 24-27) that SunAmerica is barred from recovery because it is theoretically possible that the MAAF Group would have held its shares if it could not sell them to Artemis. But the record squarely refutes any such possibility. Petitioners cite only the complaint's allegations, studiously avoiding—as usual—the more complete record developed in discovery, which demonstrated that the MAAF Group had no interest whatever in holding the shares, but was doing so solely and temporarily as a paid stalking horse for the principal conspirators, and would have been forced to divest in any event had the fraud been disclosed to state and federal regulators. SunAmerica CA9 Br. 60-62; SunAmerica CA9 Reply Br. 43-46; *see also supra* at 4-5. Petitioners similarly misstate the record in asserting that SunAmerica cannot recover because it rejected Artemis's offer to sell its New California shares in 1996. Pet. 26 n.23. In fact, the terms of that offer were more than twice as expensive as the terms on which SunAmerica could have purchased the shares in 1993 and 1994. SunAmerica CA9 Reply Br. 45.

* * * *

As the foregoing discussion shows, there is no dispute here over any applicable rule of federal law. The only pertinent conflict is between petitioners'

description of the factual record and the factual record as it actually exists. Certiorari should be denied.

## II. THERE IS NO BASIS FOR REVIEW OF THE COURT OF APPEALS' RULING ON THE STATUTE OF LIMITATIONS

The district court dismissed SunAmerica's interference claims under Rule 12(b)(6), erroneously concluding that they were barred by California Civil Code § 339(1)'s two-year statute of limitations. It reached that mistaken result after misreading a paragraph in SunAmerica's original complaint alleging that SunAmerica did not become aware of its claims "*before* the period on or around late 1998 or early 1999." Pet. App. 34a (emphasis added) (internal quotation marks omitted); *see also id.* at 99a. The district court misconstrued that allegation as a statement that SunAmerica did not become aware of its claims "until" late 1998 or early 1999. *See id.* at 35a. In other words, whereas the complaint alleged that SunAmerica became aware of its claims in late 1998 or early 1999 *at the earliest*, the district court read the allegation as saying that SunAmerica became aware of its claims in late 1998 or early 1999 *at the latest*.

Based on its erroneous reading of the original complaint, the district court refused to accept as true the allegation in SunAmerica's first and second amended complaints that SunAmerica did not become aware of its claims "until some time after it entered tolling agreements with all Defendants," i.e., May to September 2001. Pet. App. 100a. On this basis, the district court held that SunAmerica's in-

terference claims were barred by the statute of limitations because they had not been brought within two years of February 1999, the date the Commissioner commenced his suit. *See id.* at 32a.

The court of appeals correctly rejected the district court's statute-of-limitations dismissal, explaining that the court had erred in concluding that SunAmerica "had admitted in earlier pleadings to having actual knowledge of its interference claims prior to entering the tolling agreements." Pet. App. 7a.

There is no basis for review of that holding. Petitioners assert that the court of appeals' reversal raises the question whether Rule 12(b)(6), as construed in *Twombly* and *Iqbal*, allows a district court to examine inconsistent claims between original and superseding complaints, and then "refuse to give effect to such conflicting allegations where the plaintiff offers no explanation for the amendment or an implausible explanation." Pet. 28. But the decision below presents no such question. As just explained—and as the court of appeals recognized—SunAmerica's allegations were *not* inconsistent. Petitioners' question presented thus rests on a false factual premise.

Further, because the court of appeals did not consider the allegations to be inconsistent, its decision reflects no legal ruling—and thus no circuit conflict or other legal controversy—concerning the treatment of inconsistent allegations. Petitioners' real contention is that the court of appeals erred in finding the statements reconcilable as a matter of fact, but this Court does not "grant certiorari to consider fact-bound contentions" with "no effect on other cases."

*Philip Morris USA Inc. v. Scott*, No. 10A273, slip op. at 2 (Scalia, Circuit Justice, Sept. 24, 2010).

Petitioners also did not contend below that *Twombly* or *Iqbal* required the court of appeals to reject SunAmerica's allegation that it did not become aware of its claims until some time after February 1999.[5] The issue is therefore waived. *See supra* at 21.

Finally, though hardly relevant given the foregoing, it bears noting that the circuit conflict asserted by petitioners not only is not implicated by the decision below, but it is illusory on its own terms—which is no doubt why this Court previously denied certiorari on a virtually identical petition. *See Merix Corp. v. Cent. Laborers Pension Fund*, 129 S. Ct. 763 (2008). Petitioners cite two cases—neither of which appears anywhere in the court of appeals' opinion—as the basis for the supposed conflict. *See PAE Gov't Servs. v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007); *Bradley v. Chiron Corp.*, 136 F.3d 1317 (Fed. Cir. 1998). Even petitioners do not contend that the cases squarely conflict, asserting only an "apparent"

---

[5] After *Iqbal* was issued, petitioners Crédit Lyonnais, S.A., Consortium de Réalisation, and CDR-Enterprises submitted a letter pursuant to Fed. R. App. P. 28(j) notifying the court of appeals of the decision. *See* June 11, 2009, Letter to Clerk of Court. While they argued that certain of SunAmerica's claims should be rejected as "conclusory" under *Iqbal*, they *did not* argue that either *Iqbal* or *Twombly* had any bearing on the statute-of-limitations claims. *Id.* at 2. Petitioners mentioned *Twombly* and *Iqbal* in the context of the statute-of-limitations questions only in their petitions for rehearing, which fails to preserve the issue for this Court's review. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997); *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

inconsistency between them. Pet. 31. The conflict is illusory at best.

In *PAE*, the court of appeals held that a district court has no authority under Rule 12 to dismiss or strike allegations in an amended complaint because they conflict with allegations in an earlier complaint. 514 F.3d at 858-59. The court explained that conflicting pleadings, even those that are "irreconcilably at odds with each other" do not necessarily suggest bad faith, *id.* at 858, and that Rule 11 sanctions are the appropriate remedy for addressing truly frivolous complaints, *see id.* at 859-60. In *Bradley*, the court of appeals held that it was not an abuse of discretion for a court to strike conflicting allegations in amended complaints as "false and sham." 136 F.3d at 1324, 1326 (quoting *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1329-30 (9th Cir. 1981)) (internal quotation marks omitted).

*PAE* and *Bradley* both recognize a district court's authority to address allegations that are frivolous, false, or in bad faith. The only difference between them is whether that authority stems from a motion for sanctions under Federal Rule 11 (*PAE*) or a motion to strike under Federal Rule 12(f) (*Bradley*). But neither *PAE* nor *Bradley* holds that a court may reject a complaint's allegations under Rule 12(b)(6), which is petitioners' contention here. Petitioners

thus cannot cite even one circuit decision that supports their theory.[6]

Certiorari on the statute of limitations ruling should be denied.

## III. REVIEW IS UNWARRANTED BECAUSE THE CASE IS INTERLOCUTORY

Even beyond all of the foregoing reasons for denying review of the questions petitioners have identified, the interlocutory posture of the case "alone furnishe[s] sufficient ground" for this Court to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Where "the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). Accordingly, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari); *see Hamilton-Brown*, 240 U.S. at 258 ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree.").

There is no reason to deviate from that practice here. To the contrary, the present case illustrates the reasons for the prudential rule disfavoring interlocutory review. The court of appeals reinstated sev-

---

[6] Petitioners also cite (Pet. 30) two district court cases (one unpublished), but both cases are under-reasoned, and disagreements among district court opinions generally do not justify certiorari even when the issue is presented by the decision below, which is not the case here.

eral of SunAmerica's claims, including claims for breach of contract, fraud, and interference with contract and prospective economic advantage. Petitioners do not seek review of the ruling on the contract claim, and thus, regardless of the Court's disposition of the petition, the case will be remanded to proceed to trial on that claim. If the Court denies the petition as interlocutory, all of the claims can proceed to trial together, avoiding piecemeal litigation. If petitioners here (defendants below) prevail on the fraud and interference claims, that would obviate the need for the Court to consider the questions petitioners present. And if SunAmerica prevails on the contract claim, it could obtain relief essentially equivalent to the relief sought on the defrauded holder of a right of first refusal claim, effectively mooting any need for review on the latter claim. Finally, once the proceedings in the district court have been litigated to a final judgment, any dissatisfied party may appeal to the court of appeals and ultimately seek review in this Court, to the extent the judgment actually presents a legitimate federal question worthy of this Court's attention. Because no such question is presented in the case thus far, certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

M. RANDALL OPPENHEIMER
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, CA 90067

MARC F. FEINSTEIN
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
JONATHAN D. HACKER
LOREN L. ALIKHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

October 8, 2010